

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO. 7129 OF 2021

**UTTAR HARYANA BIJLI VITRAN NIGAM
LTD. AND ANOTHER**

... **Appellants**

Versus

**ADANI POWER (MUNDRA) LIMITED
AND ANOTHER**

.... **Respondents**

J U D G M E N T

HIMA KOHLI, J.

1. The appellants are aggrieved by the judgment and order dated 12th August, 2021, passed by the Appellate Tribunal for Electricity, New Delhi¹, allowing the appeal filed by the respondent No. 1 – Adani Power (Mundra) Limited² against the order dated 28th March, 2018 (in Petition No. 104/MP/2017) and order dated 06th June, 2019 (in Petition No. 214/MP/2018) passed by the Central Electricity Regulatory Commission³.

1 in short 'Appellate Tribunal'

2 in short 'Adani Power'

3 In short 'Central Commission'

2. It may be stated at the outset that the scope of the present appeal is restricted to the decision of the Appellate Tribunal of granting carrying cost interest on compounding basis in favour of the respondent No. 1 – Adani Power from the date on which the Change in Law event took place i.e. 29th January, 2014, till the date of actual payment of the amount determined by the Central Commission. Stated differently, while the appellants are not disputing grant of interest to the respondent No. 1 – Adani Power by way of carrying cost from the date on which the Change of Law event took place till the actual payment of the amount determined by the Central Commission, their grievance is that the Appellate Tribunal has not just permitted carrying cost on simple interest basis, but has imposed interest on carrying cost or what is commonly known as interest on interest (compound interest) on carrying cost.

3. To contextualize the aforesaid dispute, a brief conspectus of the relevant facts of the case may be outlined. The respondent No. 1 – Adani Power is a power generating company that has set up a 4620 MW (comprising of four units of 330 MW and five units of 660 MW), coal fired power plant in Mundra, Gujarat. The appellants are the distribution licensees that are supplying electricity to the consumers in the State of Haryana. On 07th August, 2008 the appellants entered into two Power Purchase Agreements⁴ with the respondent No. 1 – Adani Power for

⁴ In short 'PPAs'

procurement of contracted capacity of 1424 MW from the generating units 7, 8 and 9 established at Mundra, Gujarat. In the year 2010, on account of Environment Clearance dated 20th May, 2010, given by the Ministry of Environment and Forests, Union of India, a Change in Law event took place as the respondent No. 1 – Adani Power had to incur additional costs on installing Flue Gas Desulfurization⁵ unit. On 17th July, 2014, the respondent No. 1 – Adani Power filed a petition before the Central Commission for adjudication of compensation on account of certain Change in Law events including installation of the FGD. By order dated 06th February, 2017, the Central Commission allowed compensation only for certain Change in Law events but disallowed the claim for carrying cost raised by the respondent No. 1 – Adani Power. Liberty was however granted to the respondent No. 1 – Adani Power to file a separate petition before the Central Commission for the FGD claim along with requisite information and documents.

4. Aggrieved by the order dated 06th February, 2017 passed by the Central Commission, both the appellants herein and the respondent No. 1 – Adani Power preferred appeals before the Appellate Tribunal. The limited grievance raised by the appellants in their appeal was relating to the issue pertaining to the claim of the respondent No. 1 – Adani Power in respect of levy of customs duty on electricity removed from Special

⁵ In short 'FGD'

Economic Zone (SEZ) to Domestic Tariff Area (DTA). In its appeal, respondent No. 1 – Adani Power challenged the rejection of its claim for carrying cost. Respondent No. 1 – Adani Power also filed a separate petition before the Central Commission in terms of the liberty granted to it, for claiming relief on account of installation of FGD which was contested by the appellants. On 28th March, 2018, the Central Commission passed an order on the separate petition preferred by the respondent No. 1 – Adani Power, allowing compensation on account of the Change in Law event pertaining to installation of the FGD and at the same time, disallowing its claim for carrying cost.

5. In another petition filed by the respondent No. 1 – Adani Power, the Central Commission passed an order on 17th September, 2018, granting carrying costs in its favour in terms of the directions issued by the Appellate Tribunal vide judgment dated 13th April, 2018, passed in Appeal No. 210 of 2017. Pertinently, the judgment dated 13th April, 2018 passed by the Appellate Tribunal was between the same parties who are present before us and was challenged by the appellants herein before the Supreme Court in Civil Appeals No. 5865/2018 and 6190/2018. The said appeals came to be dismissed vide judgment dated 25th February, 2019⁶ wherein it was held that the power generating company would be entitled to carrying cost on restitutionary principles from the date of

Change in Law event, so as to bring the affected party to the same economic position as if such Change in Law had not occurred. For arriving at the said conclusion, reliance was placed on Article 13.2 of the PPAs governing the parties that contains an in-built restitutionary principle which compensates the party affected by such Change in Law.

6. The respondent No. 1 – Adani Power approached the Appellate Tribunal with a copy of the order passed by the Central Commission allowing the relief of Change in Law for installation of the FGD, but disallowing the relief of carrying cost and prayed that carrying cost ought to have been allowed in its favour from the date of Change in Law event pertaining to installation of FGD along with other Change in Law events. By the impugned judgment dated 12th August, 2021, the Appellate Tribunal has not only held that the respondent No. 1 – Adani Power is entitled for carrying cost in respect of compensation for Change in Law events towards FGD installation, as approved by the Central Commission, reckoned from the date of Change in Law occurrence, it has further held respondent No. 1 – Adani Power to be entitled for interest on carrying cost. Aggrieved by the said finding, the appellants are before this Court.

7. Appearing for the appellants, Mr. M.G. Ramachandran, Senior Advocate opened his arguments by stating that the appellants do not

dispute grant of interest by way of carrying cost from the date on which Change in Law event took place on account of the delayed recovery of the principal amount till the date the amount was determined by the Central Commission. The sole grievance raised by the appellants is that they are not liable to pay any compound interest to the respondent No. 1 – Adani Power as carrying cost interest. It is contended that only simple interest is payable by the appellants to the respondent No. 1 – Adani Power, for the reason that there is no wrongdoing / default / unjust enrichment that can be attributable to the appellants for the delay caused in determination of the amount by the Central Commission / Appellate Tribunal; that there is no stipulation in the PPAs dated 07th August, 2008 for payment of compound interest for the period from the date when Change in Law event had occurred i.e. w.e.f. 29th January, 2014, till the date of adjudication of the claim by the Central Commission and raising of the Supplementary Bill by the respondent No. 1 – Adani Power in terms of Article 11.8.1 (iii) of the PPA; that on the contrary, there are specific provisions in the PPAs i.e. Article 11.3.4 r/w Article 11.8.3 for the delay on the part of the appellants in making the payment after raising of the monthly / Supplementary Bill at the Late Payment Surcharge (LPS) rate which is on a compounding basis; that there is no statutory provision in the Electricity Act, 2003 or the relevant

rules/regulations framed therein, as applicable at the relevant time, which permit payment of compound interest for carrying cost.

8. It has also been argued on behalf of the appellants that though interest on interest is prescribed under the Interest Act, 1978 but the exceptions carved out under Section 4 of the said enactment does not cover the facts of the instant case since the appellants had duly paid the amount to the respondent No. 1- Adani Power upon determination by the Central Commission and within the time stipulated for clearing the Supplementary Bill that was raised on it. It was canvassed that the respondent No. 1 – Adani Power became entitled to raise a Supplementary Bill on the appellants only when the Central Commission determined the amount payable as an impact of Change in Law. The said Supplementary Bill was raised under Article 11.8.1 (iii) and was payable within 30 days in terms of Article 11.8.2 of the PPA. Contending that the Supplementary Bill can include carrying cost only if there is restitution provision under Article 13 of the PPAs and that if there is no restitution provision, the Supplementary Bill cannot even include the carrying cost.

9. Learned counsel for the appellants informed us that pursuant to passing of the impugned judgment and order dated 12th August, 2021, when the Appellate Tribunal held that the respondent No. 1- Adani

Power is entitled to carrying cost on compound interest basis and remanded the matter back to the Central Commission for computation, the Central Commission had passed an order on 23rd October, 2021, determining the methodology for calculating the carrying cost. Respondent No. 1 – Adani Power had then raised a Supplementary Bill dated 13th November, 2021 on the appellants towards the carrying cost which was paid by the appellants without prejudice to their rights and contentions as raised in the present appeal. Since there was a delay of about two months reckoned from the due date of the Supplementary Bill dated 13th November, 2021, the appellants state that they have paid the late payment surcharge for the said period of delay. In support of the submission that when compound interest is not specified in a Statute, interest payable ought to be construed to be on simple interest basis and not on compound interest basis, the decision in ***Priya Vart And Another v. Union of India***⁷ has been cited.

10. Repelling the arguments advanced on behalf of the appellants, Mr. Mukul Rohatgi, Senior Advocate appearing for the respondent No. 1 – Adani Power has in the first instance, challenged the maintainability of the present appeal stating that the same has been filed under Section 125 of the Electricity Act, 2003 which permits grounds to be taken akin to those available under Section 100 of the Civil Procedure Code⁸ and no

⁷ (1995) 5 SCC 437
⁸ for short 'CPC'

substantial question of law has been raised in the present appeal that requires determination by this Court. On merits, learned Senior Advocate has supported the findings returned in the impugned judgment and submitted that the same does not deserve any interference as it has only followed the law laid down by this Court in the judgment dated 25th February, 2019⁶, that was decided between the very same parties to the *lis*. Referring to the chronology of the dates and events in the instant case, it was submitted that admittedly, the Change in Law event had occurred when the respondent No. 1 – Adani Power had to install the FGD in the year 2014. The claim raised by the respondent No. 1 – Adani Power for installation of the FGD was finally decided by the Central Commission only in the year 2018, when carrying cost compensation on account of Change in Law event was allowed in its favour. However, carrying cost was approved only from the date of the judgment and not for the period between 2014 and 2018, whereas the respondent No. 1 – Adani Power was entitled for carrying cost right from the year 2014, when it was required to infuse huge amounts towards installation of the FGD. Reference was made to Articles 13.2 and 13.4 of the PPAs that provide for an in-built restitutionary principle and hold that compensation has to be paid from the date of occurrence of the Change in Law events. Article 11.3.4 of the PPAs was cited to buttress the submission that

compound interest is payable for delayed payments, in the manner prescribed and since the appellants had agreed to pay interest on compounding basis for delayed payments, the very same principle would apply for carrying cost as well, since both, carrying cost and late payment surcharge are to be factored in towards time value of money.

11. Alluding to the Reserve Bank of India Circulars dated 14th August, 2003 and 03rd March, 2016 that provide for a borrower to pay interest to the lender on compound interest basis, it was submitted on behalf of the respondent No.1 – Adani Power, that having borrowed money from banks to install the FGD and having paid compound interest on the borrowed sum, it was only seeking restitution for the interest incurred by it and paid to the banks at the same rate and that this was not a case of unjust enrichment. It was thus argued that, since the litigation in the instant case had commenced in the year 2014 and it took seven years to conclude the same, the respondent No. 1 – Adani Power is entitled to carrying cost and interest thereon on compounding basis from the date of Change in Law event, strictly in terms of the PPA and the law on the issue that has already been expounded by this Court.

12. We have heard the arguments advanced by the counsel for the parties and perused the relevant provisions of the PPAs. As noted above, the appellants have not raised any dispute with regard to grant of

interest to the respondent No. 1 – Adani Power by way of carrying cost from the date on which the Change in Law event took place till the date the amount was determined as payable to respondent No. 1 – Adani Power in terms of the order dated 28th March, 2018, passed by the Central Commission. The only issue that has arisen for our consideration is whether the appellants are liable to pay simple interest or compound interest on the carrying cost.

13. The relevant Articles of the PPAs cited before us are Article 11, that deals with billing and payment and Article 13, that deals with Change in Law. We are more specifically concerned with Articles 11.3.4, 11.8.1 and 11.8.3 that have been cited by learned counsel for the appellants to urge that only Late Payment Surcharge (LPS) is payable by the appellants (procurer) to the respondent No. 1 – Adani Power (seller) at the rate mentioned in Article 11.3.4, but not beyond that. For purposes of ready reference, we may extract below Articles 11.3.4, 11.8.1 and 11.8.3 as below:

“11 ARTICLE 11: BILLING AND PAYMENT

xxx xxx xxx

11.3 Payment of Monthly Bills

xxx xxx xxx

11.3.4 In the event of delay in payment of a Monthly Bill by any Procurer beyond its Due Date, a Late Payment Surcharge shall be payable by the Procurer to the Seller at the rate of two (2) percent in excess of the applicable SBAR per annum, on the amount of outstanding payment, calculated on a day to day basis (and compounded with Monthly rest), for each day of the delay.

xxx xxx xxx

11.8 Payment of Supplementary Bill

11.8.1 Either Party may raise a bill on the other Party ("Supplementary Bill") for payment on account of:

- i. Adjustments required by the Regional Energy Account (if applicable);
- ii. Tariff Payment for change in parameters, pursuant to provisions in Schedule-5; or
- iii. Change in Law as provided in Article 13 and such Bill shall be paid by the other Party.

xxx xxx xxx

11.8.3 In the event of delay in payment of a Supplementary Bill by either Party beyond one month from the date of billing, a Late Payment Surcharge shall be payable at same terms applicable to the Monthly Bill in Article 11.3.4."

14. The respondent No. 1 – Adani Power has relied on Articles 13.2 and 13.4 of the PPAs which are extracted hereinbelow:

"13 ARTICLE 13 CHANGE IN LAW

xxx xxx xxx

13.2 Application and Principles for computing impact of Change in Law

While determining the consequence of Change in Law under this Article 13, the Parties shall have due regard to the principle that the purpose of compensating the Party affected by such Change in Law, is to restore through Monthly Tariff Payments, to the extent contemplated in this Article 13, the affected party to the same economic position as if such Change in Law has not occurred.

a) Construction Period

As a result of any Change in Law, the impact of increase/decrease of Capital Cost of the Project in the Tariff shall be governed by the formula given below:

For every cumulative increase/decrease of each Rs. 8,90,000.00 (Rupees eight crore ninety lakh only) Rupees of the Contracted Capacity in the Capital Cost over the term of this Agreement, the increase/decrease in Quoted Capacity Charges shall be an amount equal to zero point two two seven (0.227%) percent of the Quoted Capacity Charges. Provided that the Seller provides to the Procurer documentary proof of

such increase/decrease in Capital Cost for establishing the impact of such Change in Law. In case of Dispute, Article 17 shall apply.

It is clarified that the above mentioned compensation shall be payable to either Party, only with effect from the date on which the total increase/decrease exceeds amount of Rs. 8,90,000,00 (Rupees eight crore ninety lakh only)

b) Operation Period

As a result of Change in Law, the compensation for any increase/decrease in revenues or cost to the Seller shall be determined and effective from such date, as decided by the Appropriate Commission whose decision shall be final and binding on both the Parties, subject to rights of appeal provided under applicable Law.

Provided that the above mentioned compensation shall be payable only if and for increase/decrease in revenues or cost to the Seller is in excess of an amount equivalent to 1 % of Letter of Credit it in aggregate for a Contract Year.”

xxx xxx xxx

13.4 Tariff Adjustment Payment on account of Change in Law

13.4.1 Subject to Article 13.2, the adjustment in Monthly Tariff Payment shall be effective from:

- (i) the date of adoption, promulgation, amendment; re-enactment or repeal of the Law or Change in Law; or
- (ii) the date of order/judgement of the Competent Court or tribunal or Indian Governmental Instrumentality, if the Change in Law is on account of a change in interpretation of Law.

13.4.2 The payment for Changes in Law shall be through supplementary bill as mentioned in Article 11.8. However, in case of any change in Tariff by reason of Change in Law, as determined in accordance with this Agreement, the Monthly Invoice to be raised by the Seller after such change in Tariff shall appropriately reflect the changed Tariff.”

15. Article 13 has been discussed threadbare by this Court in a previous litigation between the same parties decided on 25th February, 2019⁶. Without being prolix, we may extract below the relevant paras:-

“13. A reading of Article 13 as a whole, therefore, leads to the position that subject to restitutionary principles contained in Article 13.2, the adjustment in monthly tariff payment, in the facts of the present case, has to be from the date of the withdrawal of exemption which was done by administrative orders dated 06.04.2015 and 16.02.2016. The present case, therefore, falls within Article 13.4.1(i). This being the case, it is clear that the adjustment in monthly tariff payment has to be effected from the date on which the exemptions given were withdrawn. This being the case, monthly invoices to be raised by the seller after such change in tariff are to appropriately reflect the changed tariff. On the facts of the present case, it is clear that the respondents were entitled to adjustment in their monthly tariff payment from the date on which the exemption notifications became effective. This being the case, the restitutionary principle contained in Article 13.2 would kick in for the simple reason that it is only after the order dated 04.05.2017 that the CERC held that the respondents were entitled to claim added costs on account of change in law w.e.f. 01.04.2015. This being the case, it would be fallacious to say that the respondents would be claiming this restitutionary amount on some general principle of equity outside the PPA. Since it is clear that this amount of carrying cost is only relatable to Article 13 of the PPA, we find no reason to interfere with the judgment of the Appellate Tribunal.

14. We now come to some of the judgments cited by learned counsel on behalf of both sides. In *South Eastern Coalfields Ltd. v. State of Madhya Pradesh and Ors*⁹ [*“South Eastern Coalfields”*], this Court held that interest is payable in equity in certain circumstances and finally concluded: (SCC P. 662, para 24)

“24. We are, therefore, of the opinion that in the absence of there being a prohibition either in law or in the contract entered into between the two parties, there is no reason why the Coalfields should not be compensated by payment of interest for the period for which the consumers/purchasers did not pay the amount of enhanced royalty which is a constituent part of the price of the mineral for the period for which it remained unpaid. The justification for award of interest stands fortified by the weighty factor that the Coalfields themselves are obliged to pay interest to the State on such amount. It will be a travesty of justice to hold that though the Coalfields must pay

9 (2003) 8 SCC 648

the amount of interest to the State but the consumers/purchasers in whose hands the money was actually withheld be exonerated from liability to pay the interest.”

What was argued by Shri Giri was that this judgment cannot be applied to fact situations that arise under the PPA in view of Article 18.17 of the PPA which clearly states that the liability of the seller and the procurer shall be limited to that explicitly provided in this agreement and that, in no event, shall either procurer or seller claim any indirect or consequential losses or damages. Since we have found that the claim for carrying costs is under Article 13 of the PPAs, this judgment would have no application to the facts of the present case.”

16. It is clear that the restitutionary principles encapsulated in Article 13.2 would take effect for computing the impact of Change in Law. We see no reason to interfere with the impugned judgment, wherein it has been held by the Appellate Tribunal that the respondent No. 1 – Adani Power had started claiming Change in Law event compensation in respect of installation of FGD along with carrying cost, right from the year 2012 and that it has approached several fora to get this claim settled. The respondent No. 1 – Adani Power finally succeeded in getting compensation towards FGD only on 28th March, 2018, but the carrying cost claim was denied. The relief relating to carrying cost was granted to the respondent No. 1 – Adani Power by the Appellate Tribunal vide order dated 13th April, 2018 which was duly tested by this Court and upheld on 25th February, 2019⁶. Once carrying cost has been granted in favour of the respondent No. 1 – Adani Power, it cannot be urged by the appellants that interest on carrying cost should be calculated on simple

interest basis instead of compound interest basis. Grant of compound interest on carrying cost and that too from the date of the occurrence of the Change in Law event is based on sound logic. The idea behind granting interest on carrying cost is not far to see, it is aimed at restituting a party that is adversely affected by a Change in Law event and restore it to its original economic position as if such a Change in Law event had not taken place.

17. In the instant case, the respondent No. 1 – Adani Power had to incur expenses to purchase the FGD and install it in view of the terms and conditions of the Environment Clearance given by the Ministry of Environment and Forests, Union of India, in the year 2010. For this, it had to arrange finances by borrowing from banks. The interest rate framework followed by Scheduled Commercial banks and regulated by the Reserve Bank of India mandates that interest shall be charged on all advances at monthly rests. In this view of the matter, the respondent No. 1 – Adani Power is justified in stating that if the banks have charged it interest on monthly rest basis for giving loans to purchase the FGD, any restitution will be incomplete, if it is not fully compensated for the interest paid by it to the banks on compounding basis. We are of the opinion that interest on carrying cost is nothing but time value for money and the only manner in which a party can be afforded the benefit of restitution in

every which way. In the facts of the instant case, the Appellate Tribunal was justified in allowing interest on carrying cost in favour of the respondent No. 1 – Adani Power for the period between the year 2014, when the FGD was installed, till the year 2021. There was no justification for the Central Commission to have excluded the period between 2014 and 2018 and grant relief from the date of the passing of the order i.e., from 28th March, 2018 to 2021; nor is there any logic to such a segregation of time lines, particularly when the respondent No. 1 – Adani Power was prompt in raising a claim on the appellants and pursuing its legal remedies.

18. We are not persuaded by the submission made on behalf of the appellants that since no fault is attributable to them for the delay caused in determination of the amount, they cannot be saddled with the liability to pay interest on carrying cost; nor is there any substance in the argument sought to be advanced that there is no provision in the PPAs for payment of compound interest from the date when the Change in Law event had occurred.

19. The entire concept of restitutionary principles engrained in Article 13 of the PPAs has to be read in the correct perspective. The said principle that governs compensating a party for the time value for money, is the very same principle that would be invoked and applied for grant of

interest on carrying cost on account of a Change in Law event. Therefore, reliance on Articles 11.3.4 r/w 11.8.3 on the part of the appellants cannot take their case further. Nor does the decision in **Priya Vart'S Case**⁷ have any application to the facts of the present case as the said case relates to payment of compensation under the Land Acquisition Act and the interest that would be payable in case of delayed payment of compensation.

20. In view of the aforesaid discussion, the impugned judgment and order dated 12th August, 2021 passed by the Appellate Tribunal is upheld and the present appeal is accordingly dismissed as meritless.

.....CJI
[N.V. RAMANA]

.....J.
[KRISHNA MURARI]

.....J.
[HIMA KOHLI]

New Delhi,
August 24, 2022